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Supreme Court, U.S.
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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN SLAGTER,
Petitioner,

v.

STONECRAFT, LLC,
Respondent,

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. 28 U.S.C.A. § 157(c)(2) of the Bankruptcy Code provides that "the district court, **with the consent of all of the parties to the proceeding**, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title." The principal question on Writ of Certiorari is whether this provision violates Art. III of the United States Constitution for the reason that it violates the Article III, § 1 safeguards for an impartial and independent federal adjudication of claims, as well as the constitutionally mandated system of checks and balances.

2. In the event that the United States Supreme Court concludes that 28 U.S.C. § 157(c)(2) of the Bankruptcy Code does not violate Art. III of the United States Constitution, the second question concerns the permissible scope and interpretation of the concept of "consent," and, more specifically, did the United States Fifth Circuit Court of Appeal err herein as a matter of law in finding that Appellant, John Slagter, consented to having the bankruptcy judge for the S.D. Mississippi make a final determination and enter orders and judgments concerning the state law non-core adversary proceeding for which there would otherwise be no federal court jurisdiction.

3. In the event that the United States Supreme Court concludes that 28 U.S.C. § 157(c)(2) is unconstitutional and/or Appellant did not consent to final judgment and order by the bankruptcy judge, the third question is whether the U.S. District Court for the S.D. Mississippi erred in dismissing Appellant's appeal on the basis of the "equitable mootness" doctrine without first determining whether the Bankruptcy Court had subject matter jurisdiction to render and enforce a final judgment, and whether the Bankruptcy Court should have abstained from hearing the case.

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The opinion of The United States Court of Appeals, Fifth circuit was unpublished, and reprinted at App. A, p.1.

The opinion of the district court is reported at 2006 WL 1520529, , S.D.Miss., June 1,2006 (No.3:05-CV-560BN, 3:05-MC-26JCS), and reprinted at App.E, p.57

The opinion of the bankruptcy court is reported at 322 B.R. 623 (Bankr.S.D.Miss.2005), and reprinted at App. B p. 4.

BASIS FOR JURISDICTION

This Court has jurisdiction under 28 U.S.C.A. §1254(1).

CONSTITUTIONAL PROVISIONS,STATUTES, ORDINANCES INVOLVED IN THE CASE

Article III of the United States Constitution

Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be

diminished during their continuance in office. Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states; –between a state and citizens of another state;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

Section 3. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason

unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

Federal Bankruptcy Rule 7012

Rule 7012. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings

2. **(a) When presented.**

If a complaint is duly served, the defendant shall serve an answer within 30 days after the issuance of the summons, except when a different time is prescribed by the court. The court shall prescribe the time for service of the answer when service of a complaint is made by publication or upon a party in a foreign country. A party served with a pleading stating a cross-claim shall serve an answer thereto within 20 days after service. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to a complaint within 35 days after the issuance of the summons, and

shall serve an answer to a cross-claim, or a reply to a counterclaim, within 35 days after service upon the United States attorney of the pleading in which the claim is asserted. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of a more definite statement.

(b) Applicability of Rule 12(b)-(h) F.R.Civ.P.

Rule 12(b)-(h) F.R.Civ.P. applies in adversary proceedings. A responsive pleading shall admit or deny an allegation that the proceeding is core or non- core. If the response is that the proceeding is non-core, it shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. In non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties.

28 U.S.C.A. § 157...Reproduced in Appendix L at p.112.

STATEMENT OF THE CASE SETTING OUT THE FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED

The underlying dispute at issue in the adversary proceeding filed by Stonecraft, Inc., the Respondent-Debtor, involves the ownership of a patent that was invented by Appellant John Slagter. At the time that Stonecraft initiated the adversary proceeding in the S.D. Mississippi bankruptcy court, the identical issues were being litigated in Michigan state court in a case that had been pending for more than two years prior to the filing of Stonecraft's bankruptcy. There cannot be any doubt that the dispute was non-core in nature; in fact, Appellee Stonecraft conceded that it was a non-core proceeding. Further, the Fifth Circuit itself in its ruling in this case noted that it was a "non-core proceeding".

Nevertheless, despite the non-core nature of the proceeding, the bankruptcy court rendered a final judgment and orders prior to de novo review as required by 28 U.S.C.A. § 157(c)(1). The Fifth Circuit held that "the appellant, John Slagter **impliedly consented** to the bankruptcy court rendering final judgment in an adversary proceeding thereby treating this non-core proceeding as though it were a core proceeding." The Fifth Circuit ruling was the first ruling in this case on the consent issue: the United States District Court for the S.D. Mississippi dismissed Appellant's appeal on the basis of the

"equitable mootness" doctrine without first determining whether the Bankruptcy Court had subject matter jurisdiction to render and enforce a final judgment, despite Appellant's express request that it do so.

Appellant submits that the facts show that he did not expressly or even impliedly consent to the bankruptcy court asserting the jurisdiction of an Art. III court and rendering a final judgment and orders. He at all times expected to receive full de novo review of the bankruptcy court's findings of fact and conclusions of law. However, more fundamentally, he submits that 28 U.S.C.A. § 157(c)(2) violates Art. III of the United States Constitution for the reason that it violates the Art. III, § 1 safeguards for an impartial and independent federal adjudication of claims, as well as the constitutionally mandated system of checks and balances. Appellant submits that it does.

Even in the event that the Supreme Court concludes that § 157(c)(2) does not violate Art. III of the United States Constitution, the Fifth Circuit erred in its factual finding that Appellant "impliedly consented" to the bankruptcy court's assumption of full Art. III subject matter jurisdiction in the case. However, and more fundamentally, the Fifth Circuit erred in its assumption that all that is required is "implied" consent. There is a conflict among the circuits concerning the issue of "consent" under § 157 (c)(2).

Congress mandated in Rule 7012(b) that a

party must expressly consent to permit the bankruptcy court–an Art. I court–to enter judgments and orders; that is, to waive his right to full de novo review by an Art. III court. Appellant submits that not only did Congress mandate that consent be express, but further, express consent is or should be a requirement in order to comport with constitutional law to ensure that a party does not through ignorance, error, or lack of persistent objection, unintentionally waive his right to Art. III review.

Finally, Appellant submits that the Fifth Circuit erred in affirming the dismissal of Appellant's appeal on the basis of the "equitable mootness" doctrine. The district court did not first determine whether the bankruptcy court had subject matter jurisdiction to render and enforce a final judgment; "equitable mootness" cannot trump the constitutional right to Article III review.

ARGUMENT

I. SUMMARY OF ARGUMENT

In 1982, the United States Supreme Court held in *Northern Pipeline Construction Co. v. Marathon Pipeline Co., et al.*, 458 U.S. 50, 102 S.Ct. 2858 (1982) that the broad Congressional grant of jurisdiction to bankruptcy judges in the 1978 Bankruptcy Act violated Article III of the United States Constitution, which requires that judicial power of the United States be exercised by judges who have life tenure and protection against salary diminution. In response to *Northern Pipeline*, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984. In the 1984 Act, Congress "divided its jurisdictional grant into 'core' proceedings, over which the bankruptcy courts exercise full judicial power– and 'otherwise related' or 'non-core' proceedings– over which the bankruptcy courts exercise only limited power." *In the Matter of Wood*, 825 F.2d 90 (5th Cir. 1987).

28 U.S.C.A. §157(c)(1) defines the limit on the judicial power of the bankruptcy courts over "non-core" proceedings." Although a bankruptcy judge may hear a non-core proceeding that is "otherwise related" to a case under title 11, "[i]n such a proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any part has timely and specifically objected." This

section was clearly intended to preserve and protect a party's right to have an Article III court make the ultimate, de novo determination of his claims or defenses. Indisputably, the purpose and effect of this section was to safeguard an impartial and independent federal adjudication of claims, and comply with the constitutional mandated systems of checks and balances.

However, Congress followed §157(c)(1) with §157(c)(2), which provides that "[n]otwithstanding the provisions of paragraph (1) of this subsection, the district court, **with the consent of all the parties to the proceeding**, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title." [Emphasis supplied.] Three years later, in 1987, Congress amended Bankruptcy Rule 7012(b) to provide that "[a] responsive pleading shall admit or deny an allegation that the proceeding is core or non-core. If the response is that the proceeding is non-core, it shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. **In non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties.**"

In the case presented here, the United States Fifth Circuit held that "the appellant, John Slagter **impliedly consented** to the bankruptcy court rendering final judgment in an adversary proceeding thereby treating this non-core proceeding as though it were a core proceeding." (P. 2, emphasis added.)

The Fifth Circuit described this as the only "significant issue" in the case. The Fifth Circuit ruling was the first ruling in this case on the consent issue: the United States District Court for the S.D. Mississippi dismissed Appellant's appeal on the basis of the "equitable mootness" doctrine without first determining whether the Bankruptcy Court had subject matter jurisdiction to render and enforce a final judgment, despite Appellant's express request that it do so.

The principal question before the Supreme Court on this Writ of Certioriari is whether § 157(c)(2) violates Art. III of the United States Constitution for the reason that it violates the Art. III, § 1 safeguards for an impartial and independent federal adjudication of claims, as well as the constitutionally mandated system of checks and balances. Appellant submits that it does.

However, even in the event that the Supreme Court concludes that § 157(c)(2) does not violate Art. III, the Fifth Circuit erred in its factual finding that Appellant "impliedly consented" to the bankruptcy court's assumption of full Art. III subject matter jurisdiction in the case. However, and more fundamentally, the Fifth Circuit erred in its assumption that all that is required is "implied" consent.

Congress mandated in Rule 7012(b) that a party must expressly consent to permit the bankruptcy court–an Art. I court–to enter judgments and orders; that is, to waive his right to full de novo review by an Art. III court. Further, express consent is or should be a requirement in order to comport

with constitutional law to ensure that a party does not through ignorance, error, or lack of persistent objection, unintentionally waive his right to Art. III review.

Finally, Appellant submits that the Fifth Circuit erred in affirming the dismissal of Appellant's appeal on the basis of the "equitable mootness" doctrine. The district court did not first determine whether the bankruptcy court had subject matter jurisdiction to render and enforce a final judgment; "equitable mootness" cannot trump the constitutional right to Article III review.

II. Factual Background

The questions before this Court do not require an in-depth analysis of the merits of the underlying adversary case. The dispute between Appellant and the debtor, Stonecraft, involves the ownership of a patent that was invented by Appellant. At the time that Stonecraft initiated the adversary proceeding in the S.D. Mississippi bankruptcy court, the identical issues were being litigated in Michigan state court in a case that had been pending for more than two years prior to the filing of Stonecraft's bankruptcy. There cannot be any doubt that the dispute was non-core in nature; in fact, Appellee Stonecraft conceded that it was a non-core proceeding, through its failure to challenge this characterization at any time, including in its briefing on the mandatory abstention issue or in its appeal brief to the Fifth Circuit. Further, the Fifth Circuit itself in its ruling in this case noted that

it was a "non-core proceeding".[1]

The following summary will acquaint the Court with the history of the business relationship between the parties.[2]

The J. Slagter & Son Construction Company has been in the concrete roadway and bridge business in the State of Michigan since 1955. Appellant, John Slagter, began working in the business when he graduated from high school, and developed a strong interest in concrete technology. He set up his own

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1 Fifth Circuit ruling, at p. 2: "[O]nly one significant issue is presented: whether the appellant, John Slagter, implied consented to the bankruptcy court rendering final judgment in an adversary proceeding **thereby treating this non-core proceeding as though it were a core proceeding.**" (Emphasis supplied.) *See also, In the Matter of Wood, supra,* which held that **a proceeding is "core" under Section 157 "if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case."** There, as here, the case did not meet the test and was therefore a "non-core" proceeding, because it was "not based on any right created by the federal bankruptcy law. It is based on state created rights. It is simply a state contract action that, had there been no bankruptcy, could have proceeded in state court." *Id. at p. 97.*

2 The facts set forth are supported by the trial transcript; *e.g.* trial exhibits P-01, D-1, D-2, D-3, P-01, P-05; *e.g.* Ex. D-25, D-29; Tr. 1/19/05, p. 171. *e.g.* also Stonecraft counsel's closing argument, Tr. 1/21/05, p. 26; *e.g.* Tr. 1/18/05, p. 150; Ex. P-25; *e.g.* Tr. 1/19/05, p. 180; Exh. D-5 and D-32; *e.g.* Tr. 1/19/05, p. 184; Bankruptcy Court's Opinion, Appendix B,;and *e.g.* Tr. 1/19/05, at pp. 178-211.

laboratory, and experimented with concrete materials over a period of many years. In approximately 1989, he developed and made samples of the polymer cement composite technology that is the subject of the patent at issue.

In 1993, Appellant formed Stonecraft, Inc. for the express purpose of developing products from a fiber reinforced cement ("FRC") technology developed at Northwestern University. FRC technology is distinct from the technology of the Patent. FRC is a material in which fibers impart tensile strength and flexibility to an otherwise brittle material. The patent in the adversary proceeding does not use fibers; it relies on the interaction between cement and polymer chemicals to achieve flexibility.

While in the process of seeking out investors, Appellant met Milton Kuyers, the lead investor for a group interested in Appellant's business plan to make and sell FRC products. Based upon Kuyers' representations, Appellant agreed to locate the business in Mississippi, with financing to be provided by Kuyers and his group.

Stonecraft, LLC, a limited liability company formed under the laws of Michigan, was created for the purpose of making and selling products created from FRC materials. As part of the agreement between Appellant and Debtor, Appellant was engaged to manage Stonecraft. Under his guidance, Stonecraft successfully produced FRC material, and the technology remains viable as of this day. However, after Stonecraft began operations to manufacture and market the floor tile product from FRC material, the company was presented with a

new business opportunity in the roofing industry. The FRC material could not meet roofing product requirements, but the polymer cement technology invented by Appellant years prior to his involvement with Stonecraft could. Stonecraft's members authorized Slagter to evaluate his technology to take advantange of the roofing industry opportunity.

In February,1998, Stonecraft employed Harvey DeFord to assist with commercialization of Appellant's invention. DeFord assisted Appellant in preparing the information for the patent application, and represented to Stonecraft's patent attorney that John Slagter was the sole inventor.

In March, 1999, at a trade show, Stonecraft introduced a floor tile product made from the patented technology. The members of Stonecraft were pleased with the interest shown in the product at the trade show, and they agreed to invest an additional $1,000,000 in the company. However, despite Appellant's multiple requests that the members honor their agreement to fund the $1,000,000, they failed to do so. Without the investment, Appellant could not implement the business plan. Appellant believes that Kuyers and other members of the Company, upon learning of the product's potential for success, intentionally engaged in a course of conduct designed to result in Appellant's dismissal from the Company.

In October, 1999, the members of Stonecraft informed Appellant that they would not make any further investment in Stonecraft unless and until the Operating Agreement was amended to remove Appellant's right to obtain a fifty percent ownership

interest in the company. In March, 2000, after extensive negotiations and a mediation, an agreement was reached between the parties. Stonecraft's members signed the documents memorializing the agreement on April 6, 2000. Two months later, on June 6, 2000, Appellant was terminated as Stonecraft's manager.

III. Procedural Background.

After Appellant was terminated from his employment, he provided written notice to Stonecraft that the patent application was his property, and not the property of Stonecraft. Stonecraft, acting through Kuyers, filed a lawsuit in Kent County Circuit Court in the State of Michigan, seeking an order to compel an assignment of the patent from Slagter.

The Michigan lawsuit was filed on October 17, 2000. Discovery was conducted over the next two years. A pre-trial case evaluation conference was scheduled for May, 2003. However. prior to the conference date, the Kent County Circuit Court entered an opinion in a related case,[3] In its Findings of Fact, the Kent County Circuit Court found that *Stonecraft had agreed that Slagter was the owner of the Patent.*[4] This finding undoubtedly caused Stonecraft much concern about the fate of its lawsuit in that same court. On March 17, 2003, less than one

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3 Miller, Canfield, Paddock & Stone v. Stonecraft, Case No. 01-10912-CK of Kent County Circuit Court, Michigan.

4 See Opinion of Kent County Circuit Court, Findings of Fact, R. at T. Vol. 3, pp. 775-777.

month after that ruling, in a blatent attempt at forum shopping, Stonecraft filed for Chapter 11 bankruptcy protection in Mississippi, and requested a voluntary stay of the state court proceeding.

On August 18, 2003, Stonecraft filed this adversary proceeding against Appellant. Months later, Stonecraft amended the complaint in the adversary proceeding, which amendment was a verbatim restatement of the claims asserted in the Michigan state lawsuit. Appellant filed a motion for mandatory abstention, in which he clearly contended that the matter was non-core. As stated earlier, Appellee did not oppose this characterization, and the mandatory abstention issue was argued solely on the issue of whether the litigation could be timely adjudicated in the Michigan court.[5]

When the mandatory abstention request was denied by the bankruptcy court, Appellant, in his answer to the adversary proceeding, expressly denied that the matter was a core proceeding. **He never signed any document or made any affirmative statement in which he agreed that the court could render a final judgment and orders in this non-core proceeding.**[6]

The trial of the adversary proceeding was held on January 18-21, 2005, before the United States bankruptcy court, Bankruptcy Judge David W. Houston, III, presiding. Judge Houston rendered his

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5 Appellant contended that it could; the bankruptcy court ruling failed to address the issue substantively.

6 Appendix , G.

Opinion on March 10, 2005.[7] On April 22, 2005, he entered a judgment, and ordered Appellant to transfer the patents and intellectual property to Stonecraft within ten days following the date that the judgment became "final and non-appealable."[8] The bankruptcy court stated in its Opinion that it had jurisdiction of the subject matter, finding without any analysis that it was "a core proceeding," which it clearly was not. The Court concluded that Appellant "occupied a fiduciary relationship to Stonecraft," and consistent with Michigan law, Slagter "held as trustee for Stonecraft any benefit that he derived from the development of the patent." The Court then stated that Appellant would be ordered to transfer the patent to Stonecraft. The Mississippi bankruptcy court misinterpreted Michigan state law, and Appellant timely appealed to the district court.

On October 20, 2005, in response to Stonecraft's motion to enforce the April 22, 2005 judgment, and prior to the district court taking up the appeal, the bankruptcy court *amended* its judgment to, in its words, "correct" the language that protected Appellant's right to *de novo* review. The new language provided that the transfer "shall be completed within 10 days following the date that this judgment is entered."[9] For the first time, Appellant, who had relied on the language of the April 22, 2005 judgment that transfer would not be required until

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7 Appendix, B.

8 Appendix, C.

9 Appendix, D.

"ten days following the date that the judgment became final and non-appealable," became aware that he would be denied an opportunity for *de novo* review of the April 22, 2005 bankruptcy court judgment.

Upon receipt of the October 20, 2005 amended judgment, Appellant, by then representing himself because of his inability to afford legal counsel, immediately filed his "Motion for Relief from Judgment" with the District Court, in which he argued that the bankruptcy court lacked jurisdiction to enter its amended judgment. During the course of briefing he specifically argued that "[p]ursuant to 28 U.S.C. § 157(c)(1) a bankruptcy court may hear a proceeding that is not a core proceeding, however, in such proceeding, the bankruptcy judge is to submit proposed findings and conclusions of law to the district court, and, after *de novo* review, final judgment is to be entered by the district court. **Appellant never consented to entry of judgment by the bankruptcy court.**"[10] The district court refused to address this significant issue of constitutional import and the bankruptcy court was permitted to enter the judgment on January 5, 2006.

After the bankruptcy court entered the judgment, it approved, over Appellant's strenuous objections, the auction and sale of the patent to Polycem, an entity formed by the members of Stonecraft for the specific purpose of acquiring the patent. The bankruptcy court permitted the auction to go forward, despite the fact that neither the

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10 Appendix, H.

bankruptcy court nor the district court had addressed Appellant's repeated argument in multiple motions that the bankruptcy court did not have jurisdiction in this non-core proceeding to issue a final judgment or orders.

On June 1, 2006, months after Appellant had raised the issue of the Bankruptcy Court's subject matter jurisdiction, the United States District Court for the Southern District of Mississippi, Judge William H. Barbour presiding, dismissed Appellant's appeal on the basis of the equitable mootness doctrine. The Court expressly noted that Appellant had moved the Court to vacate the Amended Final Judgment of the bankruptcy court, "on the grounds that the bankruptcy court lacked jurisdiction to render a final judgment."[11] However, the Court did not address the substance of the jurisdiction issue, holding instead that **"[b]ecause the Court has determined that this appeal should be dismissed under the equitable mootness doctrine, it need not reach the merits of Slagter's Motion to Vacate. The Court therefore denies the Motion to Vacate as moot."** Application of the doctrine of "equitable mootness" –an equitable remedy which should be only sparingly and cautiously applied– was completely inappropriate, because it was the premature actions of the bankruptcy court in proceeding with the auction that created the problem, despite Appellant's ongoing arguments that the bankruptcy court did not

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11 Appendix, E.

have jurisdiction to issue a judgment and order prior to de novo review by the district court.[12]

The Fifth Circuit affirmed the district court ruling, on the basis that Appellant had "impliedly consented" to the bankruptcy court's rendering of the final judgment which "thereby treat[ed] this non-core proceeding as though it were a core proceeding."

IV. 28 U.S.C.A. § 157(c)(2) Violates Art III of the United States Constitution

> "Federal courts and bankruptcy courts are courts of limited jurisdiction." [13] Bankruptcy court jurisdiction is derived from two sections of the United States Constitution: (1) Art. III, section 2, which provides that the judicial power shall extend to all cases "arising under...the Laws of the United States...."; and (2) Art. I, section 8, which grants Congress the power "to establish...uniform Laws on the subject of Bankruptcy throughout the United States...."[14]

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12 See discussion concerning Appellant's specific efforts to have the subject matter jurisdiction issue addressed, *infra.*

13 Charles A. Wright, et al., Federal Practice and Procedure § 3522, at 60 (1984).

14 See E. Scott Fruehwald, *The Related To Subject Matter Jurisdiction of Bankruptcy Courts*, 44 Drake Law Review, Vol. 44, No. 1 (1995), at p. 29.

In 1978, Congress enacted the Bankruptcy Reform Act. "As part of its overall goal to create a more efficient procedure for administering bankruptcies, the 1978 Act vested broad powers in the bankruptcy courts."[15] However, in 1982, the U.S. Supreme Court decided *Northern Pipeline v. Marathon*,[16] and "declared the jurisdictional provision of the 1978 Act unconstitutional because, in short, it vested Article III judicial power in Article I judges."[17] The Supreme Court's lengthy analysis in *Northern Pipeline* of the differences between Art III and Article I judges, and the underlying considerations of the Constitution's framers, has more than pedantic value and historical interest. It is essential to keep these differences and considerations in mind in order to prevent an unintended erosion of the checks and balances carefully built into the constitutional structure:

> Basic to the constitutional structure established by the Framers was their recognition that 'the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny....The Federal Judiciary was therefore designed by the

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15 In re Wood, supra, at p. 90.

16 458 U.S. 50, 102 S.Ct. 2858 (1982).

17 In re Wood, at 90.

> Framers to stand independent of the Executive and Legislature– to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial.
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> ...
>
> As an inseparable element of the constitutional system of checks and balances, and as a guarantee of judicial impartiality, Art. III both defines the power and protects the independence of the Judicial Branch. It provides that 'The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish....The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.' Art. III § 1.[18]

The Supreme Court, finding that "[i]t is undisputed that the bankruptcy judges whose offices were created by the Bankruptcy Act of 1978 do not enjoy the protections constitutionally afforded to Art. III judges [of lifetime tenure during 'good behavior'

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18 Northern Pipeline, 102 S.Ct. at 2865-66.

and no diminution of salary]," and noting that "the independence of the Judiciary [must] be jealously guarded,"[19] held that the Bankruptcy Act removed most, if not all, of "the essential attributes of the judicial power" from the Art. III district judges and vested them in a non-Art. III adjunct. **"Such a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts."**[20] While acknowledging Congress' power and responsibility in connection with bankruptcy law, the Court instructed Congress that "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights...."[21]

In response to *Northern Pipeline*, Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984. In this Act, Congress "divided its jurisdictional grant into 'core' proceedings, over which the bankruptcy courts exercise full judicial power– and 'otherwise related' or 'non-core' proceedings– over which the bankruptcy courts exercise only limited power."[22]

In the case before this Court, the bankruptcy court concluded, without providing any analysis for its conclusion, that the dispute before it was a "core"

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19 Id. at 2866.

20 Id. at p. 2880.

21 Id. at p. 2872.

22 In re Wood, at p.91.

proceeding. It was not. *Even Stonecraft conceded during the mandatory abstention proceeding that the adversary proceeding is non-core.* The bankruptcy court, by rendering a final judgment, violated the United States Constitution as interpreted by the Supreme Court in *Northern Pipeline*. It is clear under *Northern Pipeline* that the "placement" of jurisdiction is an essential part of subject matter jurisdiction itself. It is equally clear that Congress intended in the 1984 Act to limit the powers of a bankruptcy court in connection with non-core adversary proceedings.[23]

28 U.S.C. § 157(c)(2), permitting "consent" to jurisdiction, eviscerates the meaning of and violates the express finding of the United States Supreme Court in *Northern Pipeline v. Marathon*, 458 U.S. 50, 102 S.Ct. 2858 (1982) that the grant of jurisdiction to bankruptcy courts as to non-core state law proceedings "impermissibly remove[s] most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court...and cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts." *Id.* at 2880.

Although Appellant acknowledges that this Court distinguishes between private rights—those that may be waived—and public rights—those which may not—this Court has not made such a determination in connection with the 1984 Bankruptcy Amendments or, specifically, § 157(c)(2). In *Commodity Futures Trading Commission v. Schor, et al.*, 478 U.S. 833, 106 S.Ct. 3245 (1986), the United

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23 *Id.*

States Supreme Court, quoting *Northern Pipeline*, reiterated that Article III of the United States Constitution "not only preserves to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States, but also serves as 'an inseparable element of the constitutional system of checks and balances'... by barring congressional attempts 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts."[24] The Court further stated that "**[t]o the extent that this structural principle is implicated in a given case, the parties cannot by consent confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III....When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.**" (Emphases supplied).[25][26]

In evaluating whether the "structural principle" was implicated in *Schor*, the Supreme Court "focused..[on] the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts,

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24 Schor, 106 S.Ct. at p. 3257.

25 Id.

26 Schor involved the consideration of the compulsory counterclaim provision of the CFTC Reparation Act, not the Bankruptcy Act. *Schor* is discussed at pp.25, *infra*.

the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III." *Id.*, 478 U.S. 851; 106 S. Ct. 3257. This Court, in applying these factors, noted that " **Aside from its authorization of counterclaim jurisdiction, the CEA leaves far more of the 'essential attributes of judicial power' to Article Ill courts than did that portion of the Bankruptcy Act found unconstitutional in *Northern Pipeline*" This Court further noted that the** CFTC deals only with a "particularized area of law," whereas the jurisdiction of the bankruptcy courts found unconstitutional in Northern Pipeline extended to broadly all civil proceedings arising under title 11 or arising in or related to cases under title 11.

Thus, even in the face of Schor's clear, unequivocal consent to proceed before the CFTC, the Supreme Court found it appropriate and necessary to determine whether there were structural principles at issue that could not be resolved by waiver or consent.

In 1997, the National Bankruptcy Review Commission (NBRC) prepared its report concerning the 1984 Bankruptcy Amendment Act. In a section titled "Constitutionality of Current Bankruptcy System," the Commission found that "[t]he Supreme Court has not ruled on the constitutionality of the 1984 amendments. The issues raised by the Court in *Marathon* such as the adjudication of public v. private rights, **whether consent of the parties satisfies Article III infirmities** , and others that are determination of the limits of an non-Article III

Court are nebulous at best."[27]

The Commission further found that a" number of commentators have concluded that bankruptcy courts "exercise the essential attributes of the judicial function" (even in core proceedings) and are unconstitutional. Under this rationale, bankruptcy judges are not authorized to enter final orders in core proceedings and the system does not satisfy Article III."[28] Appellant argues that, at the very least, § 157(c)(2) is unconstitutional, in that **consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.** Schor, id.

Appellant further notes that under the Bankruptcy Act, and specifically § 157(c)(2) and Federal Bankruptcy Rule 7012(b), it is the bankruptcy court, and not the district court, that determines whether a matter is non-core or core. In other words, it is an Article I court, rather than an Article III court, that makes the determination of the Article I court's subject matter jurisdiction. Essentially, an Article I court can wrongfully characterize a pure state law claim–like the one here–as core, and enter a judgment and orders that can result in the deprivation of a party's rights or property, such as through the auction of Appellant's patent, before a district court ever has the

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27 Commission Report, applicable pages, attached in Appendix, K.

28 Id. at p. 736; *see, e.g.* Richard Lieb, *Can a Bankruptcy Judge Constitutionally Hear and Determine a "Core" Proceeding?*, 6 Norton Bankr.L.Adv.1 (1997).

opportunity to make a de novo review of the bankruptcy court's findings of fact and conclusions of law. This process could not be what the Supreme Court had in mind when it wrote *Northern Pipeline*, and certainly the structural principles of Article III are implicated to such an extent that consent cannot resolve the clear Article III infirmities.

Appellant respectfully contends that this case presents the appropriate facts and issues for this Court to determine whether "consent" can address the Article III infirmities of the Bankruptcy Act insofar as the Act grants full jurisdiction to Article I courts to render final judgments and orders upon the parties' consent.

V. Even if § 157(c)(2) Is Upheld As Constitutional, "Consent," Must Be Express, Not Implied, In Order To Comply With The Statute And/Or The Constitution

Even assuming that consent can cure the constitutional problem of an Article I Court rendering a final judgment in a non-core proceeding, that consent must be "express," and not implied. The bankruptcy court violated Congress' clear statutory mandate of the procedure to be followed when a bankruptcy court hears a non-core proceeding.

Appellant John Slagter could not be expected to protect the institutional interests imposed by the United States Constitution and interpreted by the United States Supreme Court in *Northern Pipeline* to expressly exclude a grant of jurisdiction to a non-Article III Court to render a final judgment in a non

core state law adversary proceeding. He did, however, attempt to protect his own interests, and his assumptions and actions were reasonable and appropriate under the circumstances of this case. Certainly, he did not intend to and did not act consistent with an intent to waive his right to a *de novo* review of the Bankruptcy Court's findings and conclusions of this very important case that involved the ownership rights to a patent of a valuable product that he invented.[29]

"Waiver" is most commonly defined as "the voluntary relinquishment or abandonment– express or implied– of a legal right or advantage.... **The party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it."**[30] A right granted by the United States Constitution cannot be negligently waived. Waiver must occur through intent.

Although § 157(c)(2) does not specifically provide that a party must expressly consent to waive his right to de novo review by an Art. III court, Bankruptcy Rule 7012(b) most assuredly does: "A responsive pleading shall admit or deny an allegation that the proceeding is core or non-core. If the response is that the proceeding is non-core, it shall include a statement that the party does or does not

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29 Although the facts of the disputes are not before this Court, it is certainly appropriate and important to note that no one appears to dispute that Appellant Slagter was the inventor "in fact" of the product at issue.

30 See Black's Law Dictionary (8th ed. 2004). (Emphasis supplied.)

consent to entry of final orders or judgment by the bankruptcy judge. **In non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties."**

Rule 7012(b) was amended by Congress in 1987, three years after the enactment of 157(c)(2), and the mandate is clear.

The Bankruptcy Court for the S.D. Mississippi exceeded its authority by rendering a judgment in April, 2005, prior to *de novo* review by the District Court. However, **the judgment provided that the transfer of the patent rights "shall be completed within 10 days following the date that this Judgment becomes final and non-appealable."**[31] While it is true that Appellant did not contest the authority of the bankruptcy court to render a final judgment until seven months after he filed his appeal to the district court, it was the wording of the Bankruptcy Court's April, 2005 judgment that created the delay in Appellant's protest. Although he filed an appeal under § 158 rather than § 157, he did so because the bankruptcy court had characterized the matter as a core proceeding and had rendered a judgment. However, he was not concerned because he fully expected that the bankruptcy judgment would not be enforceable, by its own verbiage, until after de novo review by the district court.

Appellant reasonably believed from the wording of the judgment that no adverse action could

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31 Appendix, C.

be taken against him until all appeals were completed, which meant to him that all findings and conclusions would be reviewed prior to final judgment. His belief was particularly reasonable given the fact that Appellant, although represented by legal counsel during the pre-trial and trial proceedings, represented himself on appeal because of his lack of financial resources to continue to pay an attorney at that time.

On October 20, 2005, in response to Appellee Stonecraft's motion to enforce the judgment, and prior to the district court taking up the appeal, the Bankruptcy Court *amended* the judgment to "correct" the language that protected Appellant's right to *de novo* review. The new language provided that the transfer "shall be completed within 10 days following the date that this judgment is entered." [32] For the first time, Appellant became aware that he would be denied an opportunity for *de novo* review of the April 25, 2005 Bankruptcy Court judgment.

Upon receipt of the October 20, 2005 judgment, Appellant immediately filed his "Motion for Relief from Judgment"[33] with the District Court, in which he argued that the Bankruptcy Court lacked jurisdiction to enter its amended judgment. During the course of briefing he specifically argued that "[p]ursuant to 28 U.S.C. § 157(c)(1) a bankruptcy court may hear a proceeding that is not a core proceeding, however, in such proceeding, the

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32 See Appendix, D.

33 See Appendix, H.

bankruptcy judge is to submit proposed findings and conclusions of law to the district court, and, after *de novo* review, final judgment is to be entered by the district court. **Appellant never consented to entry of judgment by the bankruptcy court."** As stated by Appellant in his brief, "[t]he judgment entered by the bankruptcy court on April 22, 2005 took the foregoing limitations on bankruptcy court jurisdiction into account. The judgment ordered that Appellant execute a written form of assignment within 10 days after the date that the judgment became final and non-appealable. **That judgment clearly preserved Appellant's fundamental right to have the bankruptcy court's findings and conclusions of law reviewed by the district court before the judgment became enforceable."** The district court, inconceivably, completely ignored and failed to address this significant issue of constitutional import.[34]

On or about January 5, 2006, the bankruptcy

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34 *See, also,* Appellant's Combined Answer and Response to Plaintiff's Motion to Enforce Judgment, filed on October 3, 2005, at p. 1 and p. 9, Appendix, G; and Appellant's Response to Combined Motion for Relief from Judgment and for Enforcement of Judgment, filed January 9, 2006, Appendix, I, and Appellant's Reply to Stonecraft's Response to Objection to Entry of Amended Judgment, filed January 23, 2006, Appendix, J. These three briefs all address Appellant's right to a de novo review and his lack of consent to have the matter treated as a core proceeding. For example, in the third brief attached (Appendix, J), Appellant argued that **"There was loud, clear and unambiguous refusal of consent as Slatger expressly objected to this Court's assumption of core jurisdiction over the Adversary Case."**

court entered the Amended Judgment. The bankruptcy court then entered an order to enforce the judgment and permitted the auction and sale of the patent to Polcem, the entity made up of Stonecraft insiders that was formed solely for the purpose of acquiring the patent. The bankruptcy court permitted the sale be consummated, even in the face of the continued objections of Appellant to jurisdiction. For example, prior to entry of the Amended Judgment and the issuance of the order permitting the sale of the patent, Appellant filed an "Objection to Entry of Amended Judgment,"[35] in which he raised his right to *de novo* review of the bankruptcy judge's proposed findings of fact and conclusions of law prior to the entry of final judgment.

Clearly, Appellant believed and intended to preserve his constitutional right to have the bankruptcy court's findings of fact and conclusions of law reviewed by the district court before there was an enforceable judgment. The language of the original judgment itself, although styled a "judgment," reasonably led Slagter to the belief that his rights of de novo review by the district court were protected. Additionally, it cannot be disputed that once the district court engaged in the extraordinary act of "correcting" the judgment during a pending appeal to, effectively, substantively change it from a non-executory judgment to an executory judgment, he at

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35 See Appellant's "Objection to Entry of Amended Judgement" attached as Exhibit "A" to Appellee's "Response of Stonecraft to Motion for Termination of Stay",Appellant's Record Excerpt No.12 R., Vol 1, No.32, at USCA5 403, Appendix, F.

once protested vigorously.

This is *not* a case in which Appellant's objection "more closely resembles an afterthought than a bonafide objection," as suggested by Stonecraft in its brief to the Fifth Circuit, quoting *In re Texas General Petrolem Corp.*, 52 F.3d 1330, 1337 (5th Cir. 1995) (internal quotations omitted). Nor are the facts of this case even closely analogous to the facts of *Commodity Futures Trading Commission v. Schor, et al.*, 478 U.S. 833, 106 S.Ct. 3245 (1986), also cited by Stonecraft below, without any substantive analysis.

In *Schor,* a customer of a professional commodities broker had a debit balance in his brokerage account, and he attributed the deficit to the broker's alleged Commodity Exchange Act violations, but the broker attributed the deficit to the customer's lack of success in the market. This dispute was "typical of the disputes adjudicated in reparations proceedings...."[36] The issue before the Supreme Court was whether the Commodity Futures Trading Commission (CFTC) could constitutionally exercise the Congressional grant of authority to hear state law counterclaims brought in reparation proceedings initiated by customers.

The Supreme Court held that "Schor indisputably waived any right he may have possessed to the full trial of [his broker's] counterclaim before an Article III court." *Id.* at 3256. Appellant herein agrees– Schor *expressly* demanded that the broker proceed on his counterclaim in the CFTC reparation proceedings rather than in district court, and was

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36 Id. at 3252.

satisfied to have the dispute settled in the forum he himself had selected. In fact, it was the Court of Appeals, *sua sponte*, that raised the question of whether the CFTC could constitutionally adjudicate the counterclaims in light of *Northern Pipeline*, and not Schorr himself. Finally, it is of great significance that Schor at all times had the choice of filing his claim against the broker *either* in federal district court or before the CFTC. He had a choice; Appellant herein did not. Appellant's preference was to pursue the almost completed Michigan state court litigation to conclusion. He never waived the right to a full *de novo* review by an Article III Court, and has consistently argued that the bankruptcy court was required to abstain from hearing the patent dispute. He was ordered to litigate this Michigan state law claim in Mississippi rather than Michigan, and in bankruptcy court rather than in state court.

Although the Fifth Circuit has held in this case and in *Texas Petroleum, supra,* that only "implied consent is required, other circuits have acknowledged that express consent is mandated by Congress.

In Sheridan v. Michels, 362 F.3d 96 (1st Cir. 2004), a bankruptcy court conducted a disciplinary hearing concerning Sheridan, an attorney practicing before the court, and ultimately suspended him. Sheridan appealed to the Bankruptcy Appellate Panel ("BAP") and the BAP affirmed. On appeal to the First Circuit, Sheridan, representing himself, argued that the BAPs are only authorized to review final judgments issued by the bankruptcy court. Thus, the issue was whether the disciplinary orders issued by the bankruptcy court were "final."

The Court stated that the "finality of a bankruptcy court order depends, *inter alia*, upon whether the proceeding in which it was entered constitutes a 'core' or 'non-core' proceeding." *Id.* at p. 99. If the proceeding is non-core, the bankruptcy court may only enter a "final appealable judgment" if the litigants "have consented to the entry of a final disposition by the bankruptcy court, rather than by the district court." *Id*, at 99-100. Thus, the dispositive issue there, as here, was whether Appellant consented to the treatment of his proceeding as core.

Appellant herein refers this Court to footnote 2 of *Sheridan*, and the in-depth discussion of the applicable federal rules. Significantly, the First Circuit quotes the advisory committee's note to Fed. R. Bankr. P. 7008, which states that "A party who alleges that the proceeding is non-core shall state whether the party does or does not consent to the entry of a final order or judgment by the bankruptcy judge. **Failure to include the statement of consent does not constitute consent. Only express consent in the pleadings or otherwise is effective to authorize entry of a final order or judgment by the bankruptcy judge in a non-core proceeding."** (Emphasis supplied.)

Sheridan did not suggest that the proceeding was non-core until he submitted his post-judgment motion for reconsideration. Here, Appellant John Slagter *did* "suggest" that the proceeding was non-core from the inception, and certainly long before the January, 2005 trial. Appellant expressly denied in his Answer to the Adversary Complaint that this was

a core proceeding. Fed. R. Bankr. P. 7012 only requires this denial in a pleading; nothing else is required to preserve the objection. Further, Rule 7012 provides, in its last sentence: **"In non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties."**

The First Circuit acknowledged that Sheridan "to be sure...could have elected to place the issue in contention sooner, but the failure to do so can bear no inference of consent. When the district court refers a 'related to' proceeding to the bankruptcy court, no presumption attaches that the proceeding is core." *Id.* at 101. Here, even if this Court finds that Appellant's *pro se* opposition was not perfectly timed, executed and/or preserved, certainly he objected adequately and well before the final, enforceable judgment in January, 2006. Further, and of great significance, by the time the district court, in June, 2006, wrote its opinion, both the district court and the bankruptcy court had been aware for more than eight months of Slagter's vehement refusal to consent to the bankruptcy court entering and enforcing a final judgment. Unconscionably, the district court failed to address the jurisdiction issue, the consent issue, or the mandatory abstention issue. Instead, it granted equitable relief under the doctrine of equitable mootness.

The Eleventh Circuit has also acknowledged that "express" consent is required to waive the right to an Article III court. In *In re Davs* (*Gower v. FmHA*), 899 F.2d 1139 (11th Cir. 1990), the debtor

defrauded the FmHA in obtaining a loan. The debtor's Chapter 7 bankruptcy trustee brought an adversary proceeding against the FmHA to set aside preferential payments made to the FmHA during the ninety day period prior to the filing of the bankruptcy. The bankruptcy court ordered the return of the payments, but the district court reversed, holding that the trustee's claim was forfeited because of the debtor's admitted fraud against the FmHA. The Eleventh Circuit reversed the district court, ruling that because the Trustee's action was on behalf of other creditors, the debtor's fraud was irrelevant. After the district court affirmed the bankruptcy court decision, the trustee sought attorney fees and was awarded same by the bankruptcy court, which award was affirmed by the district court. The FmHA then appealed to the Eleventh **"contending, for the first time, that the bankruptcy court lacked jurisdiction to award attorney's fees under the EAJA."**

The Eleventh Circuit found that the bankruptcy court, as a non-Article III court, lacked jurisdiction to award BAJA fees. Further, the Court found that "the crucial element of consent" was lacking to authorize adjudication by the bankruptcy courts under 157(c)(2). Although the parties had consented to the bankruptcy court's jurisdiction over the underlying case on the merits, that consent did not specifically apply to the attorney fee action under the EAJA. The Eleventh Circuit, in finding that there was no consent, quoted Bankruptcy Rule 7012(b) that "[i]n non-core proceedings final orders and judgments

shall not be entered on the bankruptcy judge's order except with the *express consent* of the parties." It is significant to note that the emphasis was added by the court itself.

VI. Subject Matter Jurisdiction Must Be Determined Prior To Dismissing A Case On The Basis Of the "Equitable Mootness" Doctrine

The District Court dismissed the appeal on the basis that it was equitably moot, and stated that it "need not reach the merits of Slagter's Motion to Vacate." It therefore did not address the issues of jurisdiction and mandatory abstention raised in Appellant's motion. The District Court should have recognized at once that the adversary proceeding was a non-core dispute that arose under state law and that could not have been brought in federal court absent the bankruptcy. The Fifth Circuit affirmed the application of "equitable mootness," although on the merits of that argument, having already held that Appellant impliedly consented to have the case treated as a "core proceeding," despite the fact that the dispute was clearly non-core. The United States Supreme Court has held that **"[t]he validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties."** [37] Here, the bankruptcy court's judgment that the patent

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37 Ins. Corp. Of Ireland, Ltd., et al. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 102 S.Ct. 2099 (1982).

belonged to Stonecraft, and its subsequent related orders, were invalid because it did not have jurisdiction to render the judgment. By entering a final judgment, rather than submitting findings of facts and conclusions of law to an Article III court for review and decision, the bankruptcy court exceeded both its constitutional and statutory authority, and acted in precisely the manner that was held unconstitutional by the United States Supreme Court in *Northern Pipeline v. Marathon.* [38] Neither the

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38 Even setting aside the issues of jurisdiction and abstention, the District Court erred in dismissing the appeal as equitably moot. The District Court, citing *In re Manges*, 29 F.3d 1034, 1039 (5th Cir. 1994), stated that "equitable mootness is appropriate where 'there has been substantial consummation of [a] plan such that effective relief is no longer available– even though there may still be a viable dispute between the parties on appeal." Here, however, effective relief is available. *In re Manges* instructed that three factors must be examined to determine whether a bankruptcy appeal is moot: (1) has a stay been obtained; (2) has the plan been substantially consummated; and (3) would the relief requested affect either the rights of parties not before the court, or the success of the plan. Here, there will be no meaningful effect on parties not before the court, particularly in light of the fact that this was a liquidation plan, rather than a reorganization plan. Stonecraft's plan of liquidation provided that essentially all of the proceeds of the sale of the patent to MK Leasing would be paid directly back to MK Leasing. Stonecraft's creditors participated in a meager pro-rata distribution of $20,000, which no creditor receiving a payment in excess of $1,000. Further, MK Leasing, owned and controlled by the same individuals who owned Stonecraft, cannot truly be considered a "third party." Nor can Polycem, an entity formed by the members of MK Leasing, to whom the patent was

doctrine of "equitable mootness" nor any other equitable doctrine should be permitted to circumvent the fundamental requirement that a court issuing a judgment or order have subject matter jurisdiction to do so.

VII. Conclusion

This case presents the appropriate facts for the Supreme Court to address the still unresolved concerns of the National Bankruptcy Review Commission as to whether consent of the parties can satisfy Article III infirmities. As noted by the Commission, the limits of an non-Article III Court are "nebulous at best."

Further, there is significant disparity between the circuits on the issue of consent, not only as to what constitutes consent, but also as to the interplay between consent and jurisdictional limitations that cannot be resolved through consent. It is the appropriate time for the conflict between the circuits to be resolved, before any further jurisprudence is created on this issue.

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transferred after the auction. There could not be a stronger case to illustrate " the dangers associates with allowing the bankruptcy court to be the de facto final decision maker of a controversy, merely by confirming a plan of reorganization and denying a motion for stay." Equitable mootness is, of course, an equitable remedy. There is no equity in permitting the insiders of Stonecraft, under all of the facts and procedural history of this case as set forth in this brief, to deprive Appellant, the inventor of the Patent, from a full review of the merits of his case.

Finally, the ruling in this case by the district court, as affirmed by the Fifth Circuit, leads to the inevitable conclusion that the doctrine of "equitable mootness" can be used to trump the paramount concern of subject matter jurisdiction. This is not and cannot be the case.

The patent at issue in the underlying litigation has great financial value and represents years of Appellant's hard work and creativity. The ownership of the patent, which can only be determined under Michigan state law, cannot be left to an Article I bankruptcy court that usurped the role of the district court, in violation of the United States Constitution.

Appellant respectfully requests that the United States Supreme Court grant his writ of certiorari, and permit him to proceed with the filing of a brief on the merits and oral argument on the important issues of constitutional import set forth herein.

Respectfully Submitted,

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